United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7161

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7161

B
P/S

FLM COLLISION PARTS, INC.,
Plaintiff-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants-Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

BRIEF OF DEFENDANTS-CROSS-APPELLEES

SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005
(212) 952-8100

ROBERT MACCRATE
WILLIAM M. DALLAS, JR.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400
Attorneys for Defendants-Cross-Appellees

STANLEY D. ROBINSON
MICHAEL MALINA
WILLIAM A. ZOLBERT
Office of The General Counsel
Ford Motor Company
Of Counsel

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Preliminary Statement

On its cross-appeal, plaintiff-cross-appellant FLM Collision Parts, Inc. ("FLM") essentially seeks reversal of that part of the decision of the District Court (Hon. Thomas P. Griesa)[1] which dismissed FLM's Sherman Act claims[2]

1. The District Court's Slip Opinion on liability appears at pages 1574a-1642a of the Joint Appendix; it is officially reported at 406 F. Supp. 224. References to pages of the Joint Appendix and the Exhibit Volumes thereto are indicated by "a" and "e" respectively. References to paragraphs of the Stipulated Facts are preceded by the abbreviation "Stip."

2. FLM asserted violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). Its cross-appeal also includes claims of error with respect to: (1) the District Court's holding that the "indirect purchaser" doctrine is inapplicable as a matter of fact to FLM's claim under Section 2(a) of the Robinson-Patman Act;

(footnote continued on following page)

against Ford Motor Company and Ford Marketing Corporation[3] as unsupported by the evidence. As we shall demonstrate, FLM's cross-appeal strives to raise Sherman Act issues where they plainly do not exist. There is no substance to FLM's appeal on those issues—or on the subsidiary issues raised in its brief; and the District Court's decision should be affirmed in those respects.

The Issues Presented for Review by FLM's Cross-Appeal

1. Did the District Court correctly dismiss FLM's claims under Section 1 of the Sherman Act? More particularly:

(a) Did it correctly dismiss the claim premised on the *Schwinn* doctrine in light of the factual finding that no dealer was restrained from reselling crash parts to FLM?

(b) Did it correctly dismiss the claim premised on an alleged conspiracy between Ford and its dealers in light of the factual finding that there was no evidence to support such a claim?

(c) Did it correctly dismiss the claim premised on an alleged conspiracy between Ford and its subsidiary,

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(footnote continued from preceding page)

(2) the District Court's distinction in this Section 2(a) case of *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), a decision which concerns promotional allowances under Section 2(d) of that statute; (3) the District Court's rejection of certain claims of damages asserted by plaintiff; and (4) the amount of attorneys' fees awarded by the District Court and its refusal to include accounting fees as part of the taxable costs.

3. For the purposes of this brief, Ford Motor Company and Ford Marketing Corporation are referred to collectively as "Ford." When separate identification is intended, references to Ford Marketing Corporation are abbreviated to "FMC."

FMC, in light of the factual finding that there was no evidence to support such a claim?

2. Did the District Court correctly dismiss FLM's claim under Section 2 of the Sherman Act premised on alleged control of a market in which Ford is not and has never been engaged?

3. Did the District Court correctly reject FLM's contention that it should be regarded as Ford's customer for purposes of Section 2(a) of the Robinson-Patman Act when FLM never purchased crash parts from Ford and Ford exercised no control over the terms and conditions upon which Ford dealers resold to FLM?

4. Did the District Court correctly reject FLM's speculative damage claims and excessive requests for attorneys' fees and costs?

Statement of the Case

A. The Facts

The relevant facts and a description of the proceedings below are set forth at length in Ford's principal brief as appellant[4] directed to the primary issue before this Court—FLM's claim of price discrimination under Section 2(a) of the Robinson-Patman Act. However, in view of the inaccuracies in FLM's "Statement of the Case"[5] we are compelled to recite herein those facts particularly relevant to plaintiff's cross-appeal.

4. Brief of Defendants-Appellants, pp. 4-16. ("Def. Brief")

5. Brief for Plaintiff-Appellee-Cross-Appellant, pp. 3-16. ("Pl. Brief")

"Crash parts" are sheet metal parts such as fenders, grills and hoods which are custom designed and manufactured to fit particular years and models of motor vehicles. (Stip. 5) Ford sells such parts for privately-owned domestic Ford, Lincoln and Mercury vehicles *exclusively* to its franchised dealers (Stip. 10), who either use them in their own repair operations (*i.e.*, resell them to vehicle owners) or resell them to others, principally independent repair shops who compete with the dealers for the vehicle owners' business. (*Id.*)

From 1970 to the end of 1974, sales of Ford[6] vehicles and automotive replacement parts (including crash parts) were made by FMC—Ford's marketing subsidiary which had been formed in 1970 for that purpose. (Stip. 7-10) In connection with its marketing activities, FMC had the sole responsibility for promulgating and administering on a nationwide basis the various automotive discount and allowance programs offered by Ford on identical terms to all its dealers. (Stip. 16; 764a; DX G, 158e) FMC was charged with these responsibilities until December 31, 1974 when it ceased doing business and was merged with Ford Motor Company, which assumed all of FMC's activities. (2007a)

As set forth in Ford's principal brief as appellant (Def. Brief, pp. 7-8), since the 1950's Ford has made a wholesale incentive allowance ("incentive allowance") available to dealers with respect to such automotive replacement parts as spark plugs, filters, batteries and shock absorbers when resold to independent retailers—customers who could purchase similar replacement items from independent auto-

[6] References to "Ford" vehicles and dealers include Lincoln and Mercury vehicles and dealers.

motive wholesalers.[7] (777a-78a) In 1968 the incentive allowance was extended to crash parts at the behest of the Federal Trade Commission ("FTC") (DX CS-CV, 355e-60e) in an effort to encourage dealers to resell them to independent repair shops at prices comparable to those paid by dealers when using similar parts in their own repair operations (786a),[8] thereby fostering intrabrand competition at the retail level between the dealers and the independent repair shops. (PX 9, 1e)

Since its incorporation in 1965, FLM has conducted a local business, primarily in the Bronx and southern Westchester County, in which it purchases Ford crash parts from Ford dealers and resells them to independent body shops, garages and service stations in that area. (Stip. 2; 1008a) In particular, FLM has purchased crash parts from four Ford dealers: Central Lincoln-Mercury, Corp. of Brooklyn (dealership sold to Atlas Lincoln Mercury, Inc. ("Atlas") in July 1972); Thomas Motors, Inc. ("Thomas") of Yonkers; Parkview Lincoln-Mercury, Inc. ("Parkview") of Yonkers; and Pleasantville Ford, Inc. ("Pleasantville") of Pleasantville. (Stip. 22) It has never purchased crash parts from Ford. (*Id.*)

The prices FLM pays its dealer-suppliers for the parts it purchases, the terms on which it buys the parts, and the

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7. Plaintiff's statement that "FLM was the only independent wholesaler in the United States of which Ford's marketing personnel were aware . . ." (Pl. Brief, pp. 18-19), is extremely misleading. While FLM was the only independent wholesaler dealing exclusively in *crash* parts purchased from Ford dealers of which Ford was aware (814a), there were, to Ford's knowledge, at least 37,000 independent wholesalers nationwide (919a) and 3,300 wholesalers in the New York metropolitan area dealing in other types of automotive replacement parts. (823a)

8. That price is the benchmark for Ford's pricing system (Stip. 15) and is referred to as the "dealer net" price, which is 40% off Ford's suggested retail price. (445a)

choice of dealers with which it does business are all matters of negotiation between FLM and the dealers, and Ford has neither played nor sought to play any role in such matters. (PX 9, 1e; 821a-22a)

Prior to July 1971, the incentive allowance was available to dealers on resales to almost any kind of customer, the only exception being resales to another Ford dealer or to a vehicle owner. (Stip. 19) In July 1971, Ford clarified its incentive allowance policy by limiting the eligibility requirements, as they applied to *all* incentive-bearing parts (not just crash parts), to resales by dealers to customers engaged in automotive servicing or repair work. (Stip. 20) FLM claims that this change was effected with FLM specifically in mind and for the purpose of driving it out of business. (Pl. Brief, pp. 10-11) This theme, which runs throughout FLM's brief, is clearly negated by the record.

As reviewed in detail in Ford's principal brief as appellant (Def. Brief, pp. 8-11), the concerns which prompted Ford to review its eligibility requirements in 1971 arose in the context of Ford's nationwide distribution system involving 6,800 dealers (Stip. 14) who were all equally eligible to receive the incentive allowance on resales of 32,000 different kinds of incentive-bearing parts.[9] (917a) Moreover, it was in connection with resales of incentive-bearing parts *other than crash parts*, such as spark plugs, batteries and filters, that audits[10] revealed an unintended definitional

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9. Approximately 4,800 different kinds of crash parts were incentive-bearing (918a) which amounted to only 15 percent of the total number of incentive-bearing parts.

10. FLM concedes (Pl. Brief, pp. 9, 18) that Ford's only purpose in auditing its dealers was to ascertain whether the incentive allowance had been improperly paid. FLM does not, and cannot, contend that these audits had either the purpose or the effect of controlling the persons to whom or prices at which dealers resold parts.

"loophole" in the eligibility requirements which enabled dealers to claim the incentive allowance on resales to other dealers through the use of intermediaries.[11] (*See*, PX 115, 134e; PX 116, 138e; PX 117, 142e)

FLM cites the testimony of M. J. Rowlands, General Sales Manager—Ford Parts Division, purportedly to show that FLM was the target of the policy clarification. (Pl. Brief, p. 10) However, Mr. Rowlands unequivocally testified that the focal point of the change was concern over intermediaries involved in the distribution of *non*-crash parts, and that FLM was neither discussed nor considered in connection with the revision of the policy.[12] (810a-11a, 927a, 932a)

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11. As set forth in Ford's principal brief as appellant at pp. 9-11, Ford recognized that the potentially adverse effects flowing from this "loophole" were at least threefold with respect to resales of incentive-bearing parts in general: (1) it could frustrate the objectives of the incentive allowance; (2) it could undermine Ford's policy of endeavoring to see to it that all dealers ended up on a price parity; and (3) it could enable two or more dealers to defraud Ford by each claiming the incentive allowance on the same part.

12. One gross miscitation of the record should be specifically noted. FLM claims at page 10 of its brief that "Ford made this change in its wholesale incentive plan with full knowledge that it would place FLM in a 'poor competitive position,'" citing page 973 of the Joint Appendix. At that point in the record Mr. Rowlands had flatly stated that the clarification of the incentive allowance was implemented *without* considering the effect it might have on independent wholesalers:

> "Q. [D]idn't you and your associates discuss at all what effect this could have on the independent wholesalers?
>
> "A. No, we did not." (973a)

The question and answer apparently relied upon by plaintiff then follows:

> "Q. You appreciate *now*, don't you, that this places them [independent wholesalers] in a poor competitive position?
>
> * * *
>
> "A. Yes, it would place them in a poor competitive position." (973a, emphasis added)

(footnote continued on following page)

But because the problems presented by the definitional "loophole" could arise in connection with resales of any kind of incentive-bearing part and because considerations of efficiency and ease of administration dictated that the policy clarification be applied uniformly, across-the-board to all incentive-bearing parts[13] (859a, 864a), resales of crash parts were included.

The crushing answer to FLM's contention that it was the target of the 1971 change is the undisputed fact that dealers who resold crash parts to FLM continued to receive the incentive allowance for some 16 months after the change had become effective in July 1971. (Stip. 24-25) It was not until October 1972 that J. R. Rose, Ford's New York District Sales Manager, discovered this fact. (PX 32, 12e) Only then were the affected dealers, Atlas and Parkview, informed that FLM was not an "eligible wholesale customer" and therefore that they were not entitled to receive the incentive allowance on resales to FLM.[14] (PX 32, 12e, 15e) Such a 16 month delay could not conceivably have

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It is apparent that Mr. Rowlands merely stated his opinion at the time of trial that the policy clarification might have an adverse effect on independent wholesalers. This testimony gives no support to plaintiff's assertion that the change was made for the specific purpose of putting FLM in a poor competitive position; indeed, that charge is squarely refuted by the response given by Mr. Rowlands immediately preceding the quoted passage.

13. As Mr. Rowlands testified:

> "The concern here, we want one wholesale incentive system for our dealers. It is quite complex the way it is, and we did not want to add complexity by having one system for one brand of parts, another system for another, and another system for another . . ." (859a)

14. Because it was through inadvertence on the part of Ford personnel that dealers reselling to FLM had received the allowance after July 1971, Ford did not charge back the dealers for the allowances improperly paid. (Stip. 27)

occurred if Ford had changed its policy with FLM specifically in mind.

Since November 1, 1972, no Ford dealer has received the incentive allowance on resales of crash parts to FLM. (Stip. 26) Nonetheless, Ford dealers have continued to supply FLM with substantial quantities of crash parts—more than $1.9 million worth.[15] (PX 1000, 146e)

B. The District Court's Decisions

1. FLM's Robinson-Patman Claim—Devoting the bulk of its opinion to FLM's claim under Section 2(a) of the Robinson-Patman Act,[16] the District Court held that Ford had discriminated in price between dealers selling to independent repair shops and those selling to FLM; and that FLM—neither a direct nor an indirect purchaser from Ford—had standing to sue for damages. The fundamental errors in these rulings which require reversal of the judgment below are set forth in Ford's principal brief as appellant. (Def. Brief, pp. 16-38) In the course of his opinion, Judge Griesa correctly held that the "indirect purchaser" doctrine—under which a person who buys from an alleged discriminating seller's customer is treated as a purchaser itself because of the seller's control over the price that person pays—was inapplicable on the facts because Ford did not control the prices charged FLM by FLM's dealer-suppliers; and that the doctrine of *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968) (which applies to promotional allowances under Section 2(d)) has no application to a price discrimination case under Section 2(a).

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15. Moreover, according to FLM's own evidence (PX 1003, 147e), its sales during the first four months of fiscal 1976 reached record levels, averaging $75,450 per month as opposed to $66,579 per month in fiscal 1973 (Stip. 30)—the previous record sales year.

16. 15 U.S.C. § 13(a).

2. **FLM's Sherman Act Claims**—Each of FLM's claims under the Sherman Act was rejected. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)—which prohibits territorial and customer restrictions on goods after the passage of title—was held inapplicable because, far from there being any agreement between Ford and any dealer not to sell crash parts to FLM, the plaintiff received all the parts it desired. (Slip Opinion, 1634a) Second, the Court found that FLM had failed to establish any conspiracy among Ford and its dealers to fix the dealers' prices to FLM; indeed, the record demonstrated that FLM paid low prices to its dealer-suppliers, who took narrow margins on these resales. (Slip Opinion, 1580a, 1587a, 1600a) The Court likewise disposed of FLM's claim of a combination between Ford and its wholly-owned subsidiary, FMC, as unsupported by the evidence. (Slip Opinion, 1635a)

FLM's claim that Ford's refusal to sell directly to it violated the Sherman Act—a contention which the Court noted was not advanced "forcefully" (and is not pressed on FLM's cross-appeal)—was dismissed because, under "well-established law, Ford had the right to distribute automobiles and crash parts manufactured by it solely to franchised dealers." (Slip Opinion, 1637a-38a) As for FLM's claim of monopolization under Section 2 of the Sherman Act, the Court (without even reaching the issue of whether Ford possessed monopoly power in any relevant market) ruled that the statutory prohibition against the use of monopoly power on one level of distribution to destroy competition with the defendant on another level had no application here since Ford did not compete with FLM in sales of crash parts to independent repair shops.[17] (Slip Opinion, 1636a-37a)

3. **FLM's Damages and Attorneys' Fees**—Although the District Court correctly rejected a number of FLM's damage theories as wholly speculative or otherwise improper, it nevertheless awarded "automatic" damages of $246,766 (untrebled)—the full amount of the allowances which Ford dealers would have received on their resales to FLM had FLM been a repair shop. As discussed at length in Ford's principal brief as appellant, that award plainly contravenes *Enterprise Indus., Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). What is more, the Court awarded additional damages of $44,736 (untrebled) to "compensate" FLM for purportedly lost profits on sales it allegedly would have made had the incentive allowance been available to its suppliers, even though there was no evidence of actual lost sales.[18]

In addition, the District Court awarded $135,000 in attorneys' fees despite the acknowledged failure of FLM's counsel to maintain *any* records of time spent prosecuting this action. Moreover, the Court arrived at its fee award of $135,000 by inflating its initial computation, based on an estimate of time spent multiplied by an hourly rate for counsel, by over *55%* without giving an adequate explanation for such an increase and without examining the question of the overall excessiveness of attorneys' fees in view of the contingent fee arrangement between FLM and counsel in this treble damages context.

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17. Ford did have a few "dealer development franchises" in which it held a temporary ownership interest in a dealer for financing purposes. (478a) The small number of such franchises was *de minimis*, and the District Court properly found that the evidence was "hardly sufficient to permit a finding of vertical integration between Ford and its dealers." (Slip Opinion, 1637a) That finding is not challenged in FLM's cross-appeal.

18. The District Court also issued a mandatory injunction ordering Ford to extend the incentive allowance to dealers reselling crash parts to FLM.

ARGUMENT

I.

The District Court Correctly Determined That There Was No Merit to FLM's Claims Under Section 1 of the Sherman Act.

FLM's rambling argument appears to dispute two aspects of the Court's determinations under Section 1 of the Sherman Act: First, the finding that Ford's incentive allowance system did not violate the doctrine of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); and second, the findings that there was no evidence of any combination or conspiracy in restraint of trade either between Ford and its franchised dealers or between Ford Motor Company and FMC. The court below was correct on both of these issues.

A. FLM's Claim Under The Schwinn Doctrine

In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Supreme Court held that once a seller parts with title to its products, it may not, by agreement, restrict the persons to whom or the territories in which its customers may resell those products. Schwinn prohibited its dealers from selling outside their assigned areas or to anyone other than franchised Schwinn outlets, and failure to comply with these restrictions subjected the purchaser to cancellation of its franchise. On these facts, the Court concluded that such vertically imposed restrictions on the customers' right to resell were violations of Section 1.

The *Schwinn* rule rests upon two crucial elements present in *Schwinn* and absent here: (1) absolute and unconditional control by the seller over the customers with whom or the territories in which its dealers and distributors could deal;[19]

[19] 380 U.S., at 371.

and (2) firm and resolute enforcement of these restrictions by the threat of termination of the seller's relationship with its dealers and distributors.[20]

FLM does not dispute the absence of these critical elements in this case. Rather, its argument boils down to the unsound proposition that any price differential depending on the functional status of the dealer's customer amounts to an indirect restraint on the dealer's freedom to decide to whom he will resell. There are three infirmities with the argument: It is wrong as a matter of fact, as a matter of theory, and as a matter of case law.

1. FLM's argument is wrong as a matter of fact.

Judge Griesa found that there was no *Schwinn* violation because each Ford dealer was free to sell to FLM and did so (Slip Opinion, 1634a), with the result that FLM was a all times able to purchase all the crash parts it desired. That factual finding is unassailable.

The District Court found no evidence of *any* agreement of *any* kind restricting *any* dealer's freedom to resell to FLM at whatever price and on whatever terms it might negotiate with FLM. In fact, the evidence affirmatively establishes just the opposite. Ford dealers are free to resell crash parts to anyone, anywhere and at any price. (PX 9, 1e; PX 112, ¶ 3(a); DX G, 164e-65e)

FLM misreads the District Court's application of *Schwinn* when it asserts that:

> "The district court in our case was clearly in error when it held that in order for there to be a violation of Section 1 of the Sherman Act under the *Schwinn* doctrine, the manufacturer's restrictions on the conditions under and the customers to which its products

20. *Id.*, at 372.

> may be sold once it had parted with title and risk to those products had to accompany a 'price fixing' scheme." (Pl. Brief, p. 26)

The paragraph from the Court's opinion cited by plaintiff (Pl. Brief, p. 25; Slip Opinion, 1634a), makes clear that the Court was simply referring to the kinds of agreements involved in *Schwinn* (allocating territories and customers) and in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) (resale price maintenance). Judge Griesa's critical finding was that:

> "FLM has not proved the existence of any agreement between Ford and any dealers that the dealers would not sell to FLM." (Slip Opinion, 1634a)

In the face of this incontrovertible factual finding, FLM contends that Ford's refusal to extend the incentive allowance to dealers on crash parts resold to FLM had the effect of controlling the customers to which dealers could resell. (Pl. Brief, at pp. 21-22) The short answer is that, as a matter of fact, it did not. FLM's own evidence shows that after the incentive policy clarification was applied to resales to FLM in November 1972, it purchased almost $2 million in of crash parts from Ford dealers (PX 1000, 146e) —a fact totally at odds with any claim that Ford restrained its dealers from making such sales.[21]

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21. Moreover, even if there had been an agreement between Ford and its dealers not to resell parts to FLM (which there was not), the fact that FLM has been able at all times to purchase all the crash parts it desires undermines any claim that Ford was "firm and resolute" in enforcing any such purported agreement—an essential requirement before a *Schwinn* violation can be established. *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); *see also*, *United States* v. *Eaton Yale & Towne, Inc.*, 1972 CCH Trade Cas. ¶ 73,889 (D. Conn. 1972; *Ansul Co.* v. *Uniroyal, Inc.*, 306 F. Supp. 541, 559 (S.D. N.Y. 1969), *aff'd in pertinent part*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972).

2. FLM's argument is wrong as a matter of theory.

In addition to being wrong as a matter of fact, FLM's argument is wrong as a matter of theory. If one were to treat a price differential based on the identity of the purchaser's customer as the substantive equivalent of a post-sale customer restraint, any pricing variation turning upon the functional status of the buyer's customer would be a *per se* Sherman Act violation. That would eliminate from the marketplace all functional discounts to buyers who resell at two distributional levels.

For example, under FLM's view of the law, a seller could not charge a dual wholesaler-retailer less on products purchased as a wholesaler than it charged on those purchased for retail distribution to the public; for such pricing would impose a "restraint" on retail sales flowing from the higher cost of such goods. Needless to say, that conclusion would run counter to market realities and settled legal principles.

What is more, FLM's position is inherently self-contradictory. If, by charging a lower price to dealers on parts resold to independent repair shops than on those resold to FLM, Ford "restrains" sales to FLM, then by the same token, charging dealers a lower price on parts resold to independent repair shops than on those resold to vehicle owners would "restrain" sales by dealers to vehicle owners. Yet the latter "restraint" is the essence of the incentive allowance program which Ford applied to crash parts at the behest of the FTC; and FLM itself—in its Robinson-Patman Act claim—urges that it should obtain the *benefit* of that allowance—a discount which under its contorted *Schwinn* theory would be *per se* illegal.

The short of the matter is that FLM's argument would distort *Schwinn* to proscribe an incentive allowance which

was designed by Ford to produce a pro-competitive effect on intrabrand retail competition. The court below properly refused to endorse such a result.

3. FLM's argument is wrong as a matter of case law.

In at least four cases, courts have concluded that dual pricing systems dependent upon the identity of the purchaser's customer do not contravene the *Schwinn* doctrine. *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 44 U.S.L.W. 4394 (March 24, 1976); *United States* v. *Revlon, Inc.*, 1975-1 CCH Trade Cas. ¶ 60,202 (S.D.N.Y. 1975); *Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374 (Ct. Cl. 1971); *Paddington Corp.* v. *Major Brands, Inc.*, 359 F. Supp. 1244 (W.D. Okla. 1973).

Abbott Laboratories, the Supreme Court's most recent Robinson-Patman Act decision, necessarily rejects FLM's argument. The case involved the scope of a statutory provision, 15 U.S.C. § 13c, which exempts from the proscriptions of the Robinson-Patman Act purchases of supplies by non-profit institutions "for their own use". Abbott had sold drugs to non-profit hospitals at a lower price than to nearby retail druggists. These hospitals used the drugs in a variety of ways, including resales to walk-in customers who had no present connection with the hospitals. In concluding that these latter sales (among others) did not come within the "own use" exemption, the Court invited sellers like Abbott to institute extensive tracing systems to regulate and account for the use of drugs by the hospitals and to price according to use in the face of an express concern that such dual pricing would contravene the *Schwinn* doctrine:

> "[Abbott] suggests the undesirability of a supplier's 'controlling the disposition of merchandise in the

hands of a purchaser,' citing *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365, 379 (1967), and they speak of the supplier's 'retroactive exposure to claims.'" 44 U.S.L.W., at 4400.

In responding to this concern, the Court completely disposes of FLM's *Schwinn* theory:

> "[Abbott's] concern is understandable, but we feel that it is overstated. Looking at the problem from the point of view of the purchasing hospital, two alternatives, and perhaps more, are presented. The first, and easier, is for the hospital pharmacy *not* to dispense in any way hereinabove held to be outside the exemption of § 13c. The second is for the pharmacy to do exactly what [Abbott] deplore[s], namely to establish a recordkeeping procedure that segregates the nonexempt use from the exempt use. This would be supplemented by the hospital's submission to its supplier of an appropriate accounting followed by the price adjustment that is indicated. This, to be sure, is cumbersome, but it obviously is the price the Congress has exacted for the benefits bestowed by the controlling legislation, and it should be no more cumbersome than the accounting demands that are made on commercial enterprises of all kinds in our complex society of today." 44 U.S.L.W., at 4400 (footnote omitted).

The Supreme Court's invitation to engage in the recordkeeping necessary to effectuate dual pricing to the same customer—which is precisely what Ford does with respect to crash parts—is fundamentally inconsistent with any suggestion that such dual pricing could constitute a post-sale restraint in violation of *Schwinn*.

What is necessarily implicit in *Abbott Laboratories* had been made explicit earlier by Judge Wyatt in *United States* v. *Revlon*, 1975-1 CCH Trade Cas. ¶ 60,202 (S.D.N.Y. 1975),

where the Court concluded, *inter alia*, that a discounting policy similar to Ford's incentive allowance did not violate *Schwinn.*

In *Revlon*, the government challenged, among other things, Revlon's system of giving so-called "beauty jobber customers" special discounts if they resold to beauty shops and beauty schools. Under Revlon's post-1963 agreements with its jobbers each jobber was free to resell Revlon products to anyone, but if it resold to persons other than beauty shops or beauty schools, it had to repay the "functional discount" which was available only on resales to such shops or schools. The Court held that these provisions did not violate the *Schwinn* doctrine. *See also* the *Carter-Wallace* and *Paddington* cases, *supra*, which stand for the same proposition.

In sum, the facts, the theory and the case law all point inexorably to one conclusion—the *Schwinn* doctrine has no application to Ford's incentive allowance. The District Court's findings and conclusions on this issue were clearly correct and should be affirmed.

B. FLM's Conspiracy Claims

1. The record is devoid of any evidence of a conspiracy between Ford and its dealers.

The District Court unequivocally found that there was no evidence of any agreement between Ford and its dealers concerning the customers to whom or prices at which the dealers resold crash parts. (Slip Opinion, 1634a) In short, it found that these decisions were the product solely of the dealers' independent judgment.

FLM argues, citing *Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968), that the Court erred in finding no agreement because:

> "All FLM had to prove was that Ford was acting through third persons, *i.e.*, its franchised dealers, to carry out its scheme to control the persons to whom and prices at which its dealers could sell parts after Ford had parted with title and risk to those crash parts." (Pl. Brief, at p. 26)

Even assuming that *Albrecht* supports plaintiff's proposition and that such evidence would suffice to demonstrate the requisite agreement, FLM has utterly failed to meet its own standard of proof. First, there is no evidence that Ford ever sought to control the persons to whom its dealers resold parts. (Slip Opinion, 1634a) FLM has always been able to purchase all the parts it desired from Ford dealers. Furthermore, it is undisputed that the various discounts and allowances (including the incentive allowance) offered by Ford to its dealers are in no way conditioned upon the dealer's prices or terms of resale. (PX 9, 1e; 821a)

The only evidence FLM advances to support its charge of an agreement not to sell crash parts to FLM is a letter dated November 1, 1972, written by J. R. Rose, Ford's New York District Sales Manager—Ford Parts Division, to M. L. Hughes, Northeastern Regional Sales Manager—Ford Parts Division. (Pl. Brief, p. 30; PX 32, 12e) But all this letter reveals is Mr. Rose's acknowledgement that FLM was not an eligible customer on whose purchases the incentive allowance could be claimed (PX 32, 12e) and that he had communicated this fact to Mr. Pollack of Atlas and Mr. Vogel of Parkview. (*Id.* 12e, 15e) In addition, Mr. Rose expressed his personal opinion that FLM should not be permitted to establish ". . . a similar working relationship with another dealer or dealers . . .", which he noted had involved the picking up of parts without written dealer authorization, improper claims by dealers for the incentive allowance and the use of an improperly issued second

dealer parts code. (PX 32, 13e-14e) Nothing in this letter provides the least suggestion that Mr. Rose thought FLM should be prevented from purchasing crash parts. In addition, Mr. Rose testified at trial and unequivocally denied ever telling Mr. Pollack that Atlas could not sell crash parts to FLM.[22] (974a) The trial judge obviously credited Mr. Rose's testimony when he found that there was no agreement not to sell to FLM. (Slip Opinion, 1634a)

Against this factual background, FLM's reliance on *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), is totally misplaced. (Pl. Brief, at 27-28) There, in forcing franchised dealers to stop selling automobiles to so-called "discounters," General Motors personnel had direct confrontations with errant dealers, threatening to "knock their teeth down their throats" if they continued selling to discounters. 384 U.S., at 136. They also engaged in joint policing efforts with franchised dealers by using "shoppers," persons disguised as discounters who would entice dealers to sell to them and then force succumbing dealers to repurchase—often at a substantial loss. 384 U.S., at 137-38. These tactics insured the complete cessation of discount sales. In the words of the Supreme Court, *General Motors* presented a "classic conspiracy in restraint of trade." 384 U.S., at 140. Here, by contrast, the District Court's factual findings preclude any such conclusion.

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22. This denial is corroborated by the affidavit of Mr. Pollack submitted in opposition to plaintiff's motion for a preliminary injunction. (Pollack afft., ¶ 3, 106a) Significantly, FLM did not call Mr. Pollack as a witness, even though he was readily available, had been listed by FLM as a prospective witness and could have refuted this evidence had it been untrue.

2. The record is similarly devoid of any evidence of a conspiracy between Ford Motor Company and FMC.

Plaintiff's second conspiracy allegation asserts a conspiracy between Ford Motor Company and FMC to restrain trade. (Pl. Brief, pp. 28-29) The only support advanced by FLM for this claim is its citation of *Rea* v. *Ford Motor Company*, 355 F. Supp. 842 (W.D. Pa. 1973), *rev'd on other grounds*, 497 F.2d 577 (3d Cir. 1974) for the proposition that "an intracorporate conspiracy could exist between Ford Motor Company and Ford Marketing Corporation." (Pl. Brief, p. 29) But the District Court in *Rea* did *not* find that Ford Motor Company and FMC *did* conspire; in its charge to the jury it merely referred to these two entities ". . . as an illustration of how a manufacturer *could* conspire with its subsidiaries." 355 F. Supp., at 864 (emphasis added). Since the issue determined in *Rea* was solely one of law and collateral estoppel applies to findings of *fact* necessary to a prior decision, the doctrine has no application here. *See* 1B Moore, *Federal Practice* ¶ 0.442[1] (2d ed. 1965). What is more, even if the Pennsylvania District Court had found that Ford and FMC had conspired in Pittsburgh against Rea, that finding would have no bearing on the issue of whether they conspired in another completely different factual context against FLM. In any event, it was up to FLM to prove the actual existence of a conspiracy affecting it. And it utterly failed to do so.

FLM's complete failure of proof on this issue was summed up by the court below:

> "In support of its Section 1 claim FLM urges that there was a combination or conspiracy between defendant Ford Motor Company and defendant Ford Marketing Corporation. There is no evidence to sup-

port this contention. Ford Marketing Corporation did not come into existence until 1970. It assumed the marketing responsibility for Ford automobiles and parts commencing in July 1970. Ford Marketing Corporation was, of course, in existence during 1971 and 1972 when the events complained of in this action occurred. The essential point is that the relevant actions with respect to the wholesale incentive discount were undertaken, as far as the evidence shows, solely by personnel in the marketing arm of Ford, whether this arm was a division within Ford Motor Company or was a separate corporation, Ford Marketing Corporation. There is no evidence of any combination or conspiracy between the two corporations." (Slip Opinion, 1635a)

Significantly, not a word in FLM's brief even suggests that this finding of fact was not supported by the evidence, much less that it was clearly erroneous.

In sum, the District Court correctly determined that plaintiff's Section 1 claim was without merit. FLM's attempt to stretch *Schwinn* to invalidate Ford's incentive allowance is unsupportable in fact, theory and law. In addition, neither of its two conspiracy theories finds any support in the record.

II.

The District Court Correctly Determined That There Was No Merit to FLM's Monopolization Claim Under Section 2 of the Sherman Act.

FLM contends that Ford violated Section 2 of the Sherman Act[23] by seeking "to monopolize and control the sale and distribution of crash parts on the wholesale level and in the after market as well." (Pl. Brief, p. 33) The District Court rejected this claim, holding in essence that Ford could not monopolize or attempt to monopolize a market in which it did not compete.[24] That holding was eminently correct.

Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with

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23. 15 U.S.C. § 2.

24. Since Ford's absence from the allegedly monopolized "market" was dispositive, the District Court had no occasion to reach the threshold issue in any monopolization case—the delineation of the relevant market. *E.g., United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Needless to say, FLM's *ipse dixit* (Pl. Brief, p. 36) that "Ford crash parts" are the relevant product market is no substitute for proper findings based on an evidentiary record. This is particularly true here in light of the well-settled proposition that a single supplier's natural monopoly over his own product does not define the market for antitrust purposes. *E.g., United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956); *Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co., Inc.*, 510 F.2d 1140, 1144, n.3 (2d Cir. 1975); *Packard Motor Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899, 902 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). There is no reason to remand the issue of market definition to the District Court, however, because no matter how the market may be defined, no Section 2 violation was established.

any other person or persons to monopolize . . . ." The Supreme Court has defined the offense of monopolization as having two elements:

> "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[25]

And the offense of attempting to monopolize entails both a "specific intent to destroy competition or build monopoly"[26] and a "dangerous probability" that monopoly in the relevant market will be obtained.[27]

Both offenses thus require, as a prerequisite to any liability, that the putative "monopolist" be engaged in competition within the allegedly monopolized market. For how can one conceivably possess and willfully maintain monopoly power in a market which he has not entered? And how can someone outside the market be in a position where there is a dangerous probability that he will monopolize it? These questions answer themselves. To charge Ford with monopolizing or attempting to monopolize sales of Ford crash parts at wholesale when Ford sells crash parts only to franchised dealers and does not compete in the wholesale market simply makes no sense.

FLM cites no authority to support its unsound view of the law. As the District Court pointed out (Slip Opinion,

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25. *United States* v. *Grinnell Corp.*, 384 U.S 563, 570-71 (1966).

26. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953).

27. *E.g., Swift & Co.* v. *United States* 196 U.S. 375, 396 (1905); *Kreager* v. *General Electric Co.*, 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974).

1636a-37a), the only Section 2 cases relied on by FLM are plainly distinguishable because they stand for the principle that monopoly power on one level of distribution may not be utilized to destroy competition *with the defendant* at another level—a situation not present here since all of Ford's crash parts sales are made at the same distributional level—to its franchised dealers.

Thus, *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) (Pl. Brief, p. 33), concerned Kodak's refusal to accord a dealer's discount to a photographic supplies dealer with whom Kodak competed for retail business through its own vertically integrated dealer outlets. And *Poster Exchange Inc.* v. *National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (Pl. Brief, p. 34), involved a similar refusal to sell at a wholesaler's discount to jobbers competing with the defendant for equipment sales to motion picture theaters.[28] In each case, the defendant (which was a monopolist at the manufacturing level) performed acts in furtherance of an effort to extend that monopoly to the distributional level where it competed head-to-head with the plaintiff. There is no parallel here.[29] Ford does not compete with FLM—

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[28] The District Court also properly distinguished *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), on the same ground. The defendant electric utility was found to have willfully maintained its monopoly power in the retail sale of electricity by use of its dominant position as a wholesaler.

[29] FLM's citation (Pl. Brief, p. 37) of *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953)—a case which involved tie-in sales—is totally beside the point. In any event, all the Supreme Court said was that "the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market *to expand his empire into the next*" (emphasis added). *Times-Picayune* merely underscores the fallacy in FLM's argument, since in this case Ford made no effort to "expand" its business into wholesale distribution.

or with anyone else for that matter—in the distribution of crash parts to independent repair shops;[30] and that fact is the complete answer to any claim that it monopolized or attempted to monopolize such a market.[31]

Since FLM's claims of monopolization and attempt to monopolize are manifestly without foundation, its only conceivable remaining Section 2 theory would be some ephemeral conspiracy between Ford and its dealers to monopolize wholesale distribution of crash parts for the benefit of the dealers. FLM's brief does not press any such theory, and for good reason: The facts do not support it. Judge Griesa specifically found that "the sole activity of the dealers vis-a-vis Ford is to pay the prices charged by Ford" and that "FLM has not proved the existence of any agreement between Ford and any dealers that the dealers would not sell to FLM." (Slip Opinion, 1634a) These findings, which negate any concert of action between Ford and its dealers, are fully supported by the evidence. (*See* discussion at pp. 18-20, *supra*).

In sum, FLM's Section 2 claim is totally without merit, and the District Court's determination to that effect should be affirmed.

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30. As noted *supra*, p. 11, n.17, the District Court properly found that Ford's "dealer development franchises" were *de minimis*.

31. Wholly apart from this dispositive fact, and putting to one side the absence of any factual finding that Ford possessed monopoly power in a relevant market, FLM's Section 2 claim suffers from still another fatal deficiency: FLM did not prove and the District Court did not find that Ford did anything willfully to acquire or maintain its alleged power—*i.e.*, that it "had a deliberate or willful purpose to exercise monopoly power." *International Railways of Central America* v. *United Brands Co.*, 1976-1 CCH Trade Cas. ¶ 60,764, at p. 68,301 (2d Cir. 1976).

III.

The District Court Correctly Determined That FLM Was Not an Indirect Purchaser from Ford and That the *Fred Meyer* Doctrine Has No Application Here.

In the course of its opinion with respect to FLM's price discrimination claim under the Robinson-Patman Act,[32] the District Court rejected FLM's contention that it should be deemed a purchaser of crash parts from Ford despite the fact that it never bought such products from Ford and dealt only with Ford's direct customers, Ford's dealers. FLM asserted this proposition under two rubrics: (1) the "indirect purchaser" doctrine, which applies when a supplier has *de facto* control over the price paid for his products by persons who purchase, not from him, but from his customers; and (2) the doctrine of *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), which applies only to promotional payments under Section 2(d) of the statute and requires a supplier to provide such payments on proportionally equal terms to retailers buying from wholesalers if they are also provided to retailers who buy directly from the supplier. The District Court's rejection of both theories was correct.[33]

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32. Ford's principal brief as appellant (Def. Brief, pp. 16-38) sets forth the reasons why the District Court erred in holding that Ford had violated Section 2(a) of the Robinson-Patman Act and that FLM had standing to recover treble damages premised on any such violation.

33. Slip Opinion, 1619a-21a.

A. The Indirect Purchaser Doctrine

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[34] makes it unlawful "for any person . . . to discriminate in price between different purchasers . . ." under specified conditions. It is thus a statutory prerequisite to liability that there be a price discrimination between two persons who buy the same product from the same seller. There is, however, one limited exception to this basic proposition. If the defendant-seller in fact controls the price paid by a party who buys from a direct purchaser (for example, a retailer who buys from a direct-buying wholesaler), it becomes proper to treat that party as an "indirect purchaser" from the supplier. As the leading authority on the Robinson-Patman Act put it:

> "[T]he Federal Trade Commission has developed the doctrine of 'indirect purchasers,' which treats as the supplier's own customers, in contemplation of law, the accounts of his distributors whose autonomy he has supplanted by his own activities." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 57 (1962).

Since the doctrine is designed to saddle the supplier with Robinson-Patman Act responsibility for the prices paid by the "indirect purchaser" to someone else, the *sine qua non* to its application is a factual showing that the defendant so controlled the terms of resale as to make the "indirect" purchaser his own. As the District Court accurately summed up the rule's rationale:

> "The indirect purchaser doctrine has been developed to cover situations where a defendant has *de facto* control over the purchase price paid for goods by

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[34] 15 U.S.C. § 13(a).

parties more than one step removed from the defendant in the line of distribution. The basic idea is that if such a defendant in some way controls the prices to such customers by means of suggested price lists or otherwise, they become 'indirect purchasers' from the defendant within the meaning of § 2(a)." (Slip Opinion, 1619a)

Accord: *American News Co.* v. *FTC*, 300 F.2d 104, 109-10 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962) ("As long as [the supplier] exercises control over the terms of a transaction he is held to this duty [not to discriminate]; otherwise the requirement of the statute could be easily avoided by use of a 'dummy' wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors."); *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F. Supp. 876 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969) (insufficient showing of control to warrant preliminary injunction); *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969) (doctrine inapplicable because no control over discounts granted to retailers by direct purchasing wholesalers); *Purolator Products, Inc.*, 65 F.T.C. 8, 32 (1964), *aff'd*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968) (The doctrine applies where "the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval . . . .").

Applying these well-settled principles, the District Court found as a fact that "Ford has never sought to suggest or influence in any way the markup charged by a Ford dealer to FLM." (Slip Opinion, 1620a) Noting that "there is no 'suggested' price to FLM, as there is in the usual case

involving the indirect purchaser doctrine" (*Id.*), Judge Griesa concluded that FLM had failed to satisfy the doctrine.

FLM challenges neither the District Court's statement of the applicable law nor its findings of fact on this issue. Rather, it argues that Ford exercised the requisite control over the price FLM paid its dealer-suppliers because Ford did not grant the incentive allowance to its dealers on such resales. In other words, according to FLM, Ford was responsible for the price independently arrived at by the dealer solely because the dealer would not be likely to charge FLM less than the amount it had paid to Ford.

The argument is nonsensical. As the District Court aptly observed, under such a rule "the doctrine would apply to every resale of goods" (Slip Opinion, 1620a); every customer of a direct purchaser would *ipso facto* become an "indirect purchaser" of the original supplier. Under FLM's reasoning, for example, Ford "controls" the price at which dealers can resell crash parts to vehicle owners merely by charging the "dealer net" price to its dealers, since the dealers will invariably charge more to their customers than they pay to Ford—and every motorist who buys a crash part from a dealer automatically becomes Ford's "indirect purchaser" for Robinson-Patman Act purposes. Such a result, needless to say, would make a mockery of the statute.

Inconsistently, FLM does not really contend that the indirect purchaser doctrine should apply to it. For if the doctrine *were* applicable, Ford would have to see to it that FLM paid the *same* price as that paid by dealers who resell to independent repair shops. Yet FLM expressly disclaims any such obligation on Ford's part. In its brief, FLM states:

> "FLM was not contending that it had the right to purchase crash parts for the same price as franchised Ford dealers." (Pl. Brief, p. 41)

Its contention was that FLM's *suppliers* were entitled to the same price as dealers who resold to independent repair shops.

In sum, FLM's invocation of the indirect purchaser doctrine is totally devoid of merit, and the District Court correctly rejected it.

B. The Fred Meyer Doctrine

FLM also argues that, under *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), Ford was obligated to afford the incentive allowance to FLM under Section 2(d) of the statute. This claim is groundless. First it is improperly asserted for the first time on this appeal; the District Court considered *Fred Meyer* only by analogy and properly rejected FLM's argument in that regard. What is more, FLM's claim is legally unsound since Section 2(d)'s prohibition of unequal promotional allowances has nothing to do with FLM's claim of price discrimination.

Section 2(d)[35] provides, in relevant part, that:

> "[I]t shall be unlawful for any person . . . to pay . . . anything of value to . . . a customer of such person . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the . . . sale . . . of any products . . . sold . . . by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products . . . ."

35. 15 U.S.C. § 13(d)

In *Fred Meyer* the Supreme Court held that this provision requires a supplier who gives promotional or advertising allowances to a direct-buying retailer to make them available on proportionally equal terms to retailers who buy the supplier's products through wholesalers and compete for retail customers with the direct buyer. In an effort to give effect to "the central purpose of Section 2(d)"[36] and after a careful review of that provision's legislative history, the Court construed the term "customer" for purposes of that section as encompassing a retailer who buys the defendant's product from a direct-buying wholesaler and competes with a direct-buying retailer in the product's resale. That holding has no bearing whatsoever on this case.

To begin with, FLM's complaint did not charge a violation of Section 2(d), and it did not present the case to the District Court on that theory. The claim cannot now be asserted for the first time on appeal. *First Nat'l Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 636 (2d Cir. 1972) ("[W]e cannot consider a 'new issue, not raised by the pleadings in the District Court or considered by it,' whether raised by motion to amend a complaint or otherwise."); *Ansul Co.* v. *Uniroyal, Inc.*, 448 F.2d 872, 886 (2d Cir 1971), *cert. denied*, 404 U.S. 1018 (1972) (". . . Daly-Herring did not raise this issue until its appeal, and in such a situation it is clear both that the claim was not proven at trial and that it cannot be raised for the first time in this Court.").

Second, even if FLM's complaint had charged Ford with a violation of Section 2(d), the claim would be without substance. For Section 2(d) is concerned solely with promotional payments in connection with the *resale* of the defendant's products, not with the price originally paid for

36. 390 U.S., at 349.

them. That is because the statute, by its terms, applies to payments "in consideration for any services" furnished "*in connection with* the . . . sale" of the products in question by the customer. That language cannot be read to apply to the price charged to the customer by an allegedly discriminating seller. Nor does it apply to functional discounts to purchasers at different distributional levels. Section 2(d) covers only payments by the seller to the customer for promotional activities—such as advertising—unrelated to and separate from the *price* paid for the product.

The Ninth Circuit hit the nail on the head in *Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668, (9th Cir. 1975):

> "Section 2(d) does not refer to benefits to 'favored buyers' in connection with the original sale to the buyer, such as discounts, nor does it refer to a seller who charges different prices to different buyers according to the qualification or functional level of the buyer; rather it refers to payments in connection with the resale by the buyer of the goods, for advertising, promotion or other similar purposes." 511 F.2d, at 678.

See also, *Kirby* v. *P. R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 371-72 (1962).[37]

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[37] As Rowe explains at 371-72: "The objective of Sections 2(d) and 2(e) was to enact a strict prohibition on specially defined promotional arrangements which operated to confer concealed discriminatory benefits on favored buyers. Such a discriminatory advantage arose if the customer received promotional payments without a quid pro quo, or which 'subsidized' the promotion of his business to the detriment of the competitors unable to secure comparable arrangements. On the other hand, a seller's terms of sale or concessions *not* in respect of actual or purported promotional activities were to be measured by the legal provisions governing direct or indirect discrimination in price."

This distinction between the promotional payments encompassed by Section 2(d) and price discrimination within the ambit of Section 2(a) is not a mere formality. It has a critical substantive impact. While Section 2(a) prohibits only those discriminations in price likely to substantially injure competition and is subject to a "cost-justification" defense, Section 2(d)'s prohibition of disproportionate promotional allowances is virtually absolute; no injury to competition need be shown and no cost-justification defense is available. *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959). Indeed, the Supreme Court noted that this critical distinction could well have been designed to induce suppliers "to confine their discriminatory practices to price differentials . . . ." *Id.*, at 68.

Here, Ford made no promotional payments. It merely provided its dealers a 25% *discount* off the *price* they paid for crash parts which they resold to independent repair shops. Such resale is not the furnishing of a service or facility in connection with the sale of crash parts. If it were, *all* functional discounts would have to comport with Section 2(d)—a patently absurd result, since it would render superfluous the application of Section 2(a) to such discounts. Section 2(d) is thus totally inapplicable here; and *Fred Meyer*, which dealt solely with that provision of the statute,[38] is accordingly inapposite.

What is more, extension of the *Fred Meyer* rationale to price discrimination cases would be inherently anti-competitive and run directly counter to the *per se* strictures of the Sherman Act.

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[38] Although the case, as decided in the Federal Trade Commission and the Court of Appeals, involved claims under both Section 2(a) and Section 2(d), the Supreme Court's grant of certiorari was limited to the Section 2(d) issue, 386 U.S. 907 (1967), and Chief Justice Warren noted that point at the very outset of his opinion. 390 U.S., at 343-44.

It is one thing, as in *Fred Meyer,* to compel a supplier to see to it that every competing retailer of the supplier's product—whoever his immediate vendor may be—receives a proportionally equal advertising allowance. Such a rule has no effect on the *price paid by* the retailer to the direct-buying wholesaler for the product; it merely requires that a *payment be made to* every retailer who provides specified promotional services. It is quite another matter, as FLM would have it, to require the supplier to see to it that its customers pass on a discount in the *price* they charge their customers—a form of vertical price fixing and a *per se* violation of Section 1 of the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Parks & Sons,* 220 U.S. 373 (1911).

The District Court distinguished *Fred Meyer* on another somewhat related ground. It noted that the Supreme Court's purpose was "to equalize the position of the parties," that is, the competing retailers (whether or not direct purchasers from the supplier). Here, on the other hand, FLM neither sought nor was entitled to "equalization of its prices with the prices paid by the Ford dealers." (Slip Opinion, 1621a) That conclusion was correct. Indeed, any other result would, as a practical matter, dispense with the "control" requirement of the indirect purchaser doctrine. For if *Fred Meyer* applied under Section 2(a), *every* customer of a customer would be an indirect purchaser and the entire statutory scheme would become unrecognizable.[39]

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[39] It is noteworthy that this Court, after *Fred Meyer* was decided, affirmed a rejection of the indirect purchaser doctrine on the facts because the plaintiff failed to show that the defendant controlled the price paid by the customer of its customer. *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F. Supp. 876 (S.D.N.Y. 1968), *aff'd,* 405 F.2d 319 (2d Cir.), *cert. denied,* 394 U.S. 999 (1969). That result could not have been reached if *Fred Meyer* (which would render *every* customer of a customer an "indirect purchaser" as a matter of law) applied to Section 2(a) price discrimination cases.

In sum, FLM's reliance on *Fred Meyer* is totally misplaced. The Supreme Court established a limited rule for cases involving promotional payments challenged under Section 2(d). That rule simply has no application to a price discrimination case under Section 2(a).

IV.

The District Court Correctly Determined That There Was No Merit to FLM's Disallowed Claims for Damages, Attorneys' Fees and Costs.

Ford submits that, since the District Court's finding of a Robinson-Patman Act violation was erroneous and that the court below correctly disposed of FLM's Sherman Act claims, this Court need not reach the issues of damages and attorneys' fees. In any event, FLM's cross-appeal on these issues is groundless.

A. FLM's Various Claims for Damages Are Without Merit

In its brief, FLM reels off, without a semblance of analysis, a number of damage claims which it asserts the court below improperly rejected. These include: (1) lost profits purportedly due to impaired growth; (2) loss of goodwill and (3) increased dealer markups. Each of these claims was separately considered by the District Court and rejected as wholly speculative or not causally related to the violation of the Robinson-Patman Act which the Court had found. (Supp. Opinion, 2027a-32a)[40]; FLM's brief fails

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[40] The District Court's supplemental opinion on damages and attorneys' fees appears at pp. 2022a-43a of the Joint Appendix. References to pages of that opinion are preceded by the abbreviation "Supp. Opinion."

to set forth any basis whatsoever for disturbing the District Court's findings with respect to these rejected claims.

1. Claim for lost profits purportedly due to impaired growth.

FLM maintains that its sales were consistently growing at a rapid rate and that:

> "The proper method of calculating FLM's lost profits on sales was to permit FLM to take into account a growth in sales volume it had established for all of the years it had been in business and then permit FLM to recover lost profits on the difference in the sales volume between its actual volume in fiscal 1974 and fiscal 1975 and the amount of volume it would have had if Ford had not violated the antitrust laws." (Pl. Brief, at p. 47)

In addition to suffering from all the infirmities thoroughly reviewed in Ford's principal brief as appellant in connection with FLM's claim for "lost sales" which was allowed by the Court (Def. Brief, pp. 43-48), this claim simply piles speculation upon speculation.

There is not the slightest support for the contention that, if Ford had extended the incentive allowance to crash parts resold to FLM *and* FLM's suppliers had passed the entire allowance on to it, FLM's sales volume would have steadily grown at the 8.8% rate projected by its lawyer-accountant-expert witness, David L. Wasser. (PX 1002 id., 152e) Indeed the very exhibit upon which Mr. Wasser based his projection belies it. This exhibit shows that the rate of growth of FLM's sales for the three years used by Mr. Wasser to determine FLM's "average growth factor" was *steadily declining* from 15.4% in fiscal 1971 to 12.6% in fiscal 1972 to 8.4% in fiscal 1973. (*Id.*)

The unlikelihood that plaintiff's sales volume would have steadily increased, even had the dealers reselling to FLM been receiving the incentive allowance and passing it on to FLM, is buttressed further by the testimony of plaintiff's principal that the number of FLM's customers had not increased significantly since at least October 1, 1971 (1008a), long before the incentive policy clarification was made effective on resales by dealers to FLM. Moreover, with the inherently limiting factors of how much business FLM's two principals, Mr. McKee and Mr. Andidero, could personally do, FLM purposely had decided to confine its own sales area to the Bronx and lower Westchester County. (*Id.*)

Autowest, Inc. v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970) and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) (Pl. Brief, at p. 48), are beside the point. In *Autowest*, this Court found that the 10-year profit projection prepared by plaintiff was, at best, "weak" evidence of lost growth but ruled that its saving grace was that it had been prepared prior to the commencement of the action for use in making an important business decision and not, as here, for the sole purpose as a trial exhibit in litigation. 434 F.2d, at 566. As for *Bigelow*, the Supreme Court warned that a verdict may not be based upon speculation and guesswork, even when the defendant's alleged wrong has prevented a more precise computation. 327 U.S., at 264.

2. Claim of loss of goodwill.

Plaintiff's claim for loss of goodwill is ludicrous. If FLM—which is still actively engaged in business—has any meritorious antitrust claim, Ford will be, as is the case now during the pendency of appeal, subject to an injunc-

tion. Plaintiff's expert witness, Mr. W ser, failed to take this dispositive fact into account when he made his calculations of the purported loss of goodwill. (649a-50a) As the court below properly found, FLM's potential entitlement to permanent injunctive relief renders improper any award for loss of goodwill.[41] (Supp. Opinion, 2032a)

3. Claim for increased markups by dealers.

Although FLM does not discuss this claim in its damages argument, it does make reference to it in its argument under Section 1 of the Sherman Act. (Pl. Brief, p. 32) Plaintiff contends that prior to the time Atlas ceased dealing with it in 1972 it paid Atlas a 3% markup over "dealer cost," but that after Atlas ceased dealing and plaintiff began purchasing parts from other dealers, it was required to pay a 5% markup to these dealers. (*Id.*) The complete response to this contention was given by the court below when it stated:

> "[T]here is no sufficient showing that Ford's actions were the proximate cause of the termination of FLM's business dealings with Atlas. There is no indication that Ford prevented Atlas from negotiating to continue business after the withdrawal of the wholesale incentive allowance. Ford certainly did not prevent FLM from purchasing from *other* Ford dealers. As to the amount of markup charged by these other dealers, this was strictly a matter of negotiation between FLM and such dealers. Ford is not liable for this item of damages. (Supp. Opinion, 2030a)

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41. Moreover, substantial evidence was presented at trial demonstrating that FLM's claim for loss of goodwill was duplicative of its claim for lost profits from purported "lost sales"—an item of damages which was allowed by the District Court. (639a-42a; Def. Post-Trial Brief, 1554a-55a)

FLM does not, and cannot, point to any evidence to the contrary. Mr. McKee, FLM's principal, testified that after Atlas ceased dealing with his company, he negotiated separately with several dealers to purchase parts. (476a, 477a, 574a) Some of these dealers agreed to pass on to FLM the benefits of certain discounts and allowances offered by Ford to its dealers (574a), while others did not. (476a) One dealer required FLM to pay on a weekly basis for parts purchased (476a), while another agreed to bill FLM on a monthly basis. (574a) In none of these negotiations is there the least indication that Ford played any role in the dealers' decisions.

B. FLM's Claims for an Additional Award of Attorneys' Fees and Costs are Without Merit

FLM complains that the District Court erred: (1) when it failed to award more than $22,500 in attorneys' fees[42] pursuant to Section 4 of the Clayton Act[43] for services rendered by FLM's lawyer-accountant-expert witness, David L. Wasser; and (2) when it refused to award plaintiff as taxable costs the amount of fees claimed to have been paid for the accounting services of Mr. Wasser and two other certified public accountants. If the District Court acted improperly, it erred on the side of excessive generosity; and with respect to the recovery of accounting fees as taxable costs, the controlling authorities unanimously support the Court's rejection of this claim.

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42. The District Court made an initial award of attorneys' fees of $22,500 for Mr. Wasser and $64,255 for the firm of Julien & Schlesinger, P.C., plaintiff's trial counsel, based upon the Court's estimate of the time spent by counsel prosecuting this action. (Supp. Opinion, 2041a) The Court proceeded, however, to inflate this combined sum of $86,755 by over 55% to reach a final award of $135,000. (Supp. Opinion, 2042a)

43. 15 U.S.C. § 15.

1. Claim for additional attorneys' fees.

The District Court carefully noted the applicable principles under which attorneys' fees pursuant to Section 4 are to be awarded[44] and clearly reviewed counsel's claims as to the work performed and the time spent. (Supp. Opinion, 2033a-42a) As discussed more fully below, the Court's task of evaluating these claims was made more difficult by the flagrant failure of plaintiff's counsel to maintain adequate time records. But even so, substantial awards were made based upon an estimate.

The Court found that the bulk of Mr. Wasser's time was spent performing work which was ineligible for an award. This included his pre-complaint negotiations with the FTC and with Ford (Supp. Opinion, 2038a; Wasser afft., 1667a); his presentation of a motion for a preliminary injunction which was subsequently withdrawn (Supp. Opinion, 2038a; Wasser afft., 1667a-68a); and his services as plaintiff's expert witness, which was his principal function after FLM's retention of Julien & Schlesinger in July 1974. (Supp. Opinion, 2039a; Wasser afft., 1668a-70a)

Indeed, the only court papers filed by Mr. Wasser for which attorneys' fees could properly be allowed were the complaint (5a-14a), filed in February 1973, and a set of 17

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44. Plaintiff does not take issue with the well established principles followed by the District Court that awards under Section 4 may be made only for time spent successfully prosecuting antitrust claims and that in no event may awards under Section 4 be made for securing injunctive relief. *Decorative Stone Co.* v. *Bldg. Trades Council*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928); *Trans World Airlines, Inc.* v. *Hughes*, 312 F. Supp. 478, 482-83 (S.D.N.Y. 1970), *aff'd*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973); *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 218 F. Supp. 490, 492 (D. Mass. 1963), *aff'd*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964).

written interrogatories, served in March 1974. (159a-66a) For the work performed in preparing these two documents the Court awarded plaintiff $10,000 and $7,500 respectively.[45]

If the Court's award of attorneys' fees is to be faulted it can be only on the grounds of excessive generosity. If one were to apply an objective standard, the Court's award for the complaint, which is only ten pages long and contains a string of boilerplate and indiscriminate allegations never raised at trial, amounts to $1,000 per page; while the award for drafting the 17 interrogatories amounts to $440 per interrogatory.

Ford submits that these liberal fees were due in large measure to the utter failure of plaintiff's counsel to maintain adequate time records. As the court below noted:

> "The task of sorting out what time related to recoverable items and what time related to non-recoverable items is obviously made more difficult than it should be because of the failure of the attorneys to keep time records." (Supp. Opinion, 2038a)

More importantly, the magnitude of the award of attorneys' fees in the face of this acknowledged refusal of counsel to maintain time records squarely contra enes the express policy declared by this Court that counsel seeking fee awards must maintain records of time spent:

> "We wish to emphasize that any attorney who hopes to obtain an allowance from the court should

45. The Court determined that an appropriate hourly rate for Mr. Wasser's legal services was $100 (Supp. Opinion, 2040a) and allowed Mr. Wasser 100 hours for investigating the facts and preparing the complaint (Supp. Opinion, 2038a) and 75 hours for drafting the set of written interrogatories. (Supp. Opinion, 2039a)

> keep accurate and current records of work done and time spent . . . . There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so." *In re Hudson & Manhattan Railroad Co.*, 339 F.2d 114, 115 (2d Cir. 1964).

More recently, *In re Borgenicht*, 470 F.2d 283 (2d Cir. 1972), recognized that the continuing failure of counsel to maintain adequate time records, despite the Court's admonitions, may require the imposition of sanctions:

> "The failure of appellee here to keep proper records indicates that some other course may be required to obtain compliance with what we regard as a desirable practice." 470 F.2d, at 284.

Notwithstanding these repeated warnings, the court below failed to impose any sanctions on plaintiff's counsel or indeed to take *any* corrective action.[46] Instead, as noted above, the Court appears to have given counsel an overly large award for very little recoverable work. In addition, it compounded its generosity by inflating the award by over 55% to reach a final award of $135,000. (Supp. Opinion, 2041a-42a) We submit that the District Court's award is

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[46] The District Court refused to require FLM to produce for the Court's examination the contingent fee agreements FLM had entered into with counsel, even though Ford vigorously requested such production. (1802a-04a) Such an examination would have enabled the Court to determine whether the Section 4 award when combined with the amount of the contingent fee resulted in an excessive fee contrary to DR 2-106(A) of the Code of Professional Responsibility. Under the circumstances presented here, the Court was obligated to make such an examination. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 87-88 (1st Cir. 1970).

nothing less than a reward to plaintiff's counsel for their careless record-keeping and effectively nullifies this Court's express desire to curb these practices.

For these reasons, as urged in Ford's principal brief as appellant (Def. Brief, pp. 3-4, n.2), a substantial *reduction* in the award of attorneys' fees would be fully justified. In no event is there any justification for increasing it.

2. Claim for accounting fees.

Without citing any supporting authority, FLM contends that it should receive as costs the amounts claimed to have been expended for accounting fees. (P. Brief, p. 50) This Court considered and squarely rejected a similar claim in *Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973):

> "TWA's last contention is that it should be compensated for fees paid to its experts as part of its 'costs of suit,' 15 U.S.C. § 15. This precise issue has long since been decided contrary to TWA's position in this Circuit, *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) and TWA has not persuaded us that that decision, or the unanimous host of cases relying on *Straus* in this and other jurisdictions should be overruled." 449 F.2d, at 81.

Accord: *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F. Supp. 143, 162 (D. Md. 1968), *mod. on other grounds*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561, 586 (10th Cir. 1961), *cert. dism'd sub nom.*, *Wade* v. *Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962).

CONCLUSION

For all the foregoing reasons, Ford submits that the rulings of the District Court from which FLM cross-appeals should be affirmed.

Dated: New York, New York
June 8, 1976

Respectfully submitted,

SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005
(212) 952-8100

ROBERT MACCRATE
WILLIAM M. DALLAS, JR.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

Attorneys for Defendants-Cross-Appellees

STANLEY D. ROBINSON
MICHAEL MALINA

WILLIAM A. ZOLBERT
Office of The General Counsel
Ford Motor Company

Of Counsel